

OHS Legal & Regulatory Update

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Online Evaluation



Biden Administration at Mid-Point

- Who's in Charge?
 - Biden DOL Secretary: Boston Mayor Marty Walsh departed 3/23
 - Julie Su nominated & contentious
 - Doug Parker – former CalOSHA chief has headed OSHA since 10/21
 - OSHA Enforcement: Relaunch of SVEP Program, Whistleblower Policy Revamp and expansion of “IBI” (formerly “egregious” penalties – now Instance-by-Instance)
 - House flipped to GOP, narrow margin
 - First piece of OHS legislation was Rep. Biggs’ “NOSHA Act” (abolishes agency)
- OSHA penalty increases took effect 1/15/2023
 - Maximum for willful/repeat violations: \$156,259
 - Maximum for serious/OTS and failure to abate: \$15,625
 - **MSHA max penalty is now \$313K against employers; \$85K against supervisors!**



Agency Collaboration for Protections

Collaboration for protection of workers extends beyond OSHA:

- 11/21: DOL, NLRB, & EEOC launched joint initiative on retaliation issues when workers exercise their protected labor rights
 - Includes collaboration among agencies to protect workers on issues of unlawful retaliatory conduct, worker outreach, educating public; and engaging with employers, business organizations, labor organizations, and civil rights groups
- 1/2022: DOL & NLRB signed new MOU strengthening the agencies' partnership and outlining procedures on information-sharing, joint investigations, and enforcement activity, as well as training, education, and community outreach
- ✓ OSHA is aggressively prosecuting whistleblower violations under their statutory provisions (and 29 CFR 1904.36) – manual revised in 2022 to adopt 15 new enforcement and investigation policies



Outlook: OSHA Priorities

- Reboot of VPP program
- IBI enforcement (former “egregious” policy)
- Placement in SVEP – with impact from NLRB “Joint Employer” definition changes
- Increase use of employer injury/illness data for enforcement – new SST program launched in 2023
- More multi-employer citations (following OSHA court victory)
- Continued emphasis on “gig” workers and misclassification of employees as contractors
- Heightened whistleblower protection enforcement under Sec 11C and 29 CFR 1904.36
 - New whistleblower investigations manual issued in 4/2022:
https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf
- Robust rulemaking agenda!



IBI Enforcement Policy 2023

- OSHA expanded its “egregious violation” policy to allow its use in high gravity serious violation cases, and recordkeeping cases, rather than limiting it to willful/repeated citations.
- Now called “instance-by-instance” (IBI) cases, the 1/26/23 policy revisions take effect in 60 days, and allow multiple citations and penalties for a single occurrence
- Factors to be considered include:
 - The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current
 - The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39
 - The proposed citations are related to a fatality/catastrophe
 - The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.
 - Instance-by-instance citations may be applied when the text of the relevant standard allows (such as, but not limited to, per machine, location, entry, or employee), and when the instances of violation cannot be abated by a single method of abatement.



Severe Violator Enforcement Program (SVEP)

- OSHA relaunched revised SVEP in 10/22, building on original 2010 program
- OSHA's updated SVEP criteria include the following:
 - Program placement for employers with citations for at least two willful or repeated violations or who receive failure-to-abate notices based on the presence of high-gravity serious violations.
 - Follow-up or referral inspections made one year – but not longer than two years – after the final order
 - Potential removal from the Severe Violator Enforcement Program three years after the date of receiving verification that the employer has abated all program-related hazards.
 - Employers' ability to reduce time spent in the program to two years, if they consent to an enhanced settlement agreement that includes use of a safety and health management system with seven basic elements in OSHA's Recommended Practices for Safety and Health Programs (I2P2).



SVEP Criteria

- OSHA designates employers as “severe violators” if they have an inspection meeting one or more of the following criteria:
 - Fatality/Catastrophe Criterion: A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations.
 - Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards: An inspection in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on **high gravity serious violations** related to a **High-Emphasis Hazard** (e.g., fall hazards and those related to NEPs: amputations, combustible dust, crystalline silica, excavation/trenching, lead, and shipbreaking)
 - Non-Fatality/Catastrophe Criterion for Hazards Due to the Potential Release of a Highly Hazardous Chemical (Process Safety Management): An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards defined in the PSM standard.
 - Egregious Criterion: All IBI enforcement actions will be considered SVEP cases.



Reboot of SST Program

- The inspection plan covers nonconstruction worksites with 20 or more employees, and uses “objective data” derived from the electronic injury and illness data submitted by employers under 29 CFR Part 1904.41.
- Rebooted SST enforcement plan uses reported data from CY 2019 through 2021 to select the establishments OSHA will inspect, resources permitting
- CPL 02-01-064 took effect 2/23 and will be in effect for two years.
- States that administer their own OSHA programs were directed to have equivalent programs
- If worksite does not meet the criteria due to being < 20 employees, the inspection will be terminated.
- OSHA may conduct a “records only” inspection (including employee interviews) to verify I/I data.
- Any violations in plain view or brought to OSHA’s attention during discussion with workers can expand the scope of the inspection.



VPP Revisions Coming!

- 2/16/23 - OSHA published a request for comments on ways to “modernize” its decades-old Voluntary Protection Program (VPP)
- Potential changes include charging a fee for VPP participation, offering new incentives for joining the program, and switching to a “tiered” approach for worksite recognition.
- VPP worksites have a “DART” rate that averages 53% below the average for the participant’s industry sector (non-construction) and 60% lower for construction.
- VPP is available to diverse industries: employers and contractors, large and small companies, union and open shops, and even site-based and mobile workforce sites are all eligible. There are approximately 2,200 organizations recognized as VPP sites currently.
- Comments were due by 4/14/23 – www.regulations.gov



Fall 2022 OSHA Regulatory Agenda

Pre-rule stage – Key Items:

- Mechanical Power Presses. OSHA is analyzing comments from a Request for Information in 2021.
- Workplace Violence in Healthcare and Social Services. Watch for *potential* that the scope of this rule could be expanded, in light of the many mass shootings at retail, service, education and other workplaces -- some unions have called for expansion of state OSHA workplace violence rules.
- Blood Lead Level for Medical Removal. OSHA is reviewing comments from an Advanced Notice of Proposed Rulemaking in 2022. This impacts those doing welding work, as well as those engaged in demolition and waste removal activities, and shooting ranges.
- Heat Illness. OSHA anticipates initiating the SBREFA process in early 2023. This will impact workplaces in terms of regulating exposure to both indoor and outdoor heat sources.
 - There are already mandated heat exposure reduction standards in a number of states that run their own OSHA programs (e.g., California, Washington, Oregon, Minnesota)



Fall 2022 Regulatory Agenda (2)

Proposed rule stage – Key items:

- Lock Out/Tag Out update. A NPRM is slated to be published in July 2023. This is an update to allow more types of computerized or laser controls, to be utilized – essentially, to bring the OSHA rule more in alignment with current ANSI guarding and LOTO standards.
- PPE in Construction. NPRM to be published in early 2023 (actually overdue from December 2022). Addressing that women workers and some small statured male workers often are not provided with appropriately fitting Personal Protective Equipment (PPE)
- Powered Industrial Truck Design. The NPRM was published in February 2022, and would update the currently adopted ANSI standard from 1969 and replace it by incorporating more current (2019/2020/2021) ANSI standards for forklifts and other powered industrial trucks.
- Respirable crystalline silica: NPRM due in September 2023 to address medical removal.
- Walking Working Surfaces amendments. The NPRM for the general industry fall protection rule plans to re-open the rulemaking record May 2023, but this is largely a technical correction.
- Worker Walkaround Representative Designation. This is a new item on the agenda, to “clarify” that the designated representative does not need to be an employee if the representative is so designated by workers. The NPRM is due in May 2023.



Fall 2022 Regulatory Agenda (3)

Final Rule Stage:

- Hazard Communication update, to be issued in March 2023. While primarily impacting chemical manufacturers, it will also have an impact on importers and distributors and will likely require retraining of all workers to understand the changes in labeling and chemical classification.
- Tracking of Workplace Injuries and Illnesses (to require electronic submission of OSHA 300A forms by certain employers of 20 to 99 workers, and expanded submissions by employers of 100 or more to include the OSHA Accident Forms 300 and 301).
 - *According to the agenda, OSHA anticipates a final rule in March 2023, but the agency subsequently announced that it would be delayed until June 2023. The rule is already under review at OMB. A lawsuit by unions to force OSHA, to restore the 2016 requirements that were eliminated under the Trump administration, had been on hold but with the recently announced delay, the litigants have threatened to activate the case.*
- Procedures for use of Administrative Subpoenas. This is a new item on the Regulatory Agenda, and OSHA anticipates bypassing the NPRM stage by issuing an "interim final rule" in June 2023. The stated goal is to clarify provisions in the current procedures for issuing such subpoenas during OSHA investigations.



More Changes to OSHA E-Recordkeeping

- OSHA reopened e-Recordkeeping rule 3/30/22—**comment period closed**
 - Does NOT address antiretaliation provisions, only record submission
- All records submitted electronically will be publicly searchable on OSHA website but will redact personal identifiers of workers (company name WILL be identified as well as worksite name).
 - OSHA plans to finalize by 6/23 (at OMB now)
- Proposes revising NAICS codes that trigger submission of 300A logs by "small" employers (redefined as 20-99 employees at a worksite).
- Proposes adding new submission requirements for specified employers (using NAICS) with 100+ workers at a worksite—would have to submit 300 and 301 logs PLUS 300A summary
 - Current rule requires all employers with 250+ employees to submit 300A, regardless of NAICS, but Trump revisions had eliminated 300/301 log requirements.



Heat Stress Prevention ANPRM

- OSHA issued ANPRM on 10/27/21 for a new rule on "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings" - extended comment deadline was 1/26/22
- OSHA lost key heat stress case where OSHRC held it could not use the National Weather Services' "Heat Index" for enforcement - *Secretary of Labor v. A.H. Sturgill Roofing, Inc.* This necessitated a rulemaking in order for OSHA to be able to regulate this hazard at the federal level.
- "Excessive heat" as including outdoor or indoor exposure to heat at levels that exceed the capacities of the body to maintain normal body functions and may cause heat-related injury, illness, or fatality.
- OSHA seeks public comment on the nature and extent of hazardous heat in the workplace and interventions and controls to prevent heat-related injury and illness, including measuring heat exposures, strategies to reduce it, personal protective equipment and other controls, and worker training and engagement
- ANPRM Federal Register notice is: https://www.govinfo.gov/content/pkg/FR-2021-10-27/pdf/2021-23250.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list



OSHA Guidance on Heat Stress Prevention

OSHA says methods of abating heat stress hazards in workplaces include:

1. Permitting workers to drink water or cold liquids (e.g., sports drinks) at liberty;
2. Establishing provisions for a work/rest regimen so that exposure time to high temperatures and/or the work rate is decreased;
3. Developing a heat stress program which incorporates the following:
 - a) A training program informing employees about the effects of heat stress, and how to recognize heat-related illness symptoms and prevent heat-induced illnesses;
 - b) A screening program to identify health conditions aggravated by elevated environmental temperatures;
 - c) An acclimation program for new employees or employees returning to work from absences of three or more days;
 - d) Specific procedures to be followed for heat-related emergency situations; and
 - e) Provisions that first aid be administered immediately to employees displaying symptoms of heat-related illness.



OSHA GHS/HazCom Proposed Rule

- OSHA announced proposed rule 2/8/2021 to update its Hazard Communication Standard to align with the 7th revision to the GHS system (in 2/16/2021 Fed. Register)
- Proposed modifications fall into four categories:
 - Maintain alignment with GHS
 - Address issues coming to light since implementation in 2012
 - Alignment with Canada and other US trading partners
 - Improve alignment with other US agencies (DOT, EPA etc.) – but MSHA never adopted GHS at all!
- Has become more contentious than expected – opposed by most business groups
- Final rule now overdue!
- Comment deadline closed 5/21 & public hearing was 9/21
 - Docket OSHA-2019-0001 on <https://www.regulations.gov>



Biden Independent Contractor Rule

- Proposed Rule would restore the multi-factor “totality of the circumstances” analysis from Obama Admin and eliminate emphasis on “entrepreneurial opportunity” (Trump’s rule)
- Important b/c OSHA and MSHA adopt DOL definitions and these impact citation policies and defenses – DOL also focused on worker misclassification now!
- Obama rule included a six-factor test to determine whether a worker is “economically dependent” on an employer for work, designed to reflect the true “economic realities” of the relationship
- Factors include:
 - The opportunity for profit or loss depending on managerial skill;
 - Investments made by the worker and the employer;
 - The degree of permanence of the work relationship;
 - The nature and degree of control over the working relationship;
 - The extent to which the work performed is an integral part of the employer’s business; and
 - The skill and initiative of the worker in performing the work.



NLRB “Joint Employer” Rulemaking

- 9/7/22: NLRB proposed rule modifying Joint Employer definition (again) to fill gap left by rescission of Trump rule – final rule due August 2023
- NLRB has proposed broader definition, which would expand “*Browning-Ferris*” standard used under Obama: Direct, indirect, or reserved authority to control one or more essential terms and conditions of employment would lead to a finding of joint employer status.
- NPRM features broad definition of “essential terms and conditions of employment”
 - Beyond wages, benefits, and hiring and discharge, NPRM also includes “work rules and directions governing the manner, means, or methods of work performance”
- Joint employer status under the National Labor Relations Act results in a shared obligation to:
 - bargain collectively with an existing union directly representing one of the employers, and
 - recognize a union newly certified at one of the employers.
- It is also used by DOL/OSHA to determine scope of corporate-wide abatement and settlement agreements, repeat violation exposure etc.
- Poorly written contracts could extend joint employer status into contractor/sub relations and temp/host employer situations



EEOC, “Long-COVID” & ADA

- September 2021: EEOC declares “Long-COVID” as condition covered by ADA and Section 501 of the Rehabilitation Act if the symptoms substantially limit a “major life activity”
 - Impact on work-related “Long-COVID” cases & worker’s comp – will be state-by-state determination
 - Estimated 4 MILLION workers are out of workforce due to Long-COVID!
- EEOC cross-references definition of “long COVID” by DOJ/HHS in their “[Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557](#)” - symptoms include:
 - Tiredness or fatigue
 - Difficulty thinking or concentrating (sometimes called “brain fog”)
 - Shortness of breath or difficulty breathing, or cough
 - Headache
 - Dizziness on standing
 - Fast-beating or pounding heart (known as heart palpitations) or chest pain
 - Joint or muscle pain
 - Depression or anxiety
 - Loss of taste or smell
 - Damage to multiple organs including the heart, lungs, kidneys, skin, and brain.



ESG & SEC Disclosure Rulemaking

- SEC is moving toward issuing new “Climate Change Disclosure” rules requiring corporate disclosure of ESG-related activities – **Proposed Rule (140 pages) was in 4/11/22 Federal Register (87 Fed Reg 21334) – final rule due April 2023!**
- SEC proposal requires registrants to provide certain climate-related info in registration statements and annual reports, including greenhouse gas emissions and other metrics
- Proposal also requires info about registrant’s “climate-related risks” reasonably likely to have “material impact on its business, results of operations, or financial condition” disclosure rule with transparency
- Companies would have to conduct 3 levels of analysis on climate impact: (1) direct impact of ops in terms of products made; (2) indirect effects on environment from using electricity, trucks, vehicles; and (3) **assess “carbon footprint” of suppliers, business travel & assets that company leases**
 - Only “material” disclosures would be required (#3 only applies to largest companies)



ESG : What Must Be Disclosed Now?

- Institutional investors calling for clear regulatory guidance and/or rules for sustainability disclosures (SEC and Financial Accounting Standards Board)
- Issue is “Materiality” – what information is **MATERIAL to the investment decision** – substantial likelihood that investor would consider it important in making the investment decision (*TSC Industries v. Northway, SCOTUS 1976*)
 - Can include info about a corporation’s performance on climate change, DEI efforts, political spending, supply chain management (including child labor practices), community support, human capital management and more
 - Currently, ESG disclosure is voluntary (other than PAC contributions, EEOC requirements for federal contractors, SEC reporting of some MSHA citations for publicly traded mining companies)
 - In wake of SOX guidance, most companies formed disclosure committees to cover SEC required info
 - Committee activities can expand to include ESG audits and disclosure, or a subcommittee can be used for this non-reportable info (audit must also consider litigation and reputational risks arising from materially incorrect ESG disclosures)



Medical Cannabis Update

- 41 states (plus DC and all US territories) have legalized medical cannabis – latest are AL, MS and KY!
- 22 states (plus DC, Guam and CNMI) have now legalized recreational MJ – MD, MO and DE are the latest, while Arkansas, ND and SD rejected initiatives
- Federal cannabis decriminalization likely – Biden has called for declassification as CDS & pardoned federal prisoners convicted of cannabis possession
 - Federal legalization will negate current ADA case law that does not protect medical users because it is “illegal” under federal law
- Veterans Equal Access Act, or [H.R. 2431](#) was reintroduced in 4/23: the bipartisan legislation expands and facilitates medical cannabis access to military veterans suffering from chronic pain, PTSD, and other serious medical conditions by allowing physicians affiliated with the Department of Veterans Affairs to recommend cannabis in compliance with state laws
 - But 4/26, the GOP blocked bringing a package of 5 cannabis reform and research measures to the Senate floor by a vote of 57-42!



OSHA Policy on Drug Tests

- Trump OSHA issued “clarifying” policy on 10/11/2018: <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>
 - **Biden administration affirmed the 2018 policy in its 2022 whistleblower handbook rev:**
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers’ compensation law.
 - Drug testing under other federal law, such as DOT regs for CDL
 - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
 - **If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries, and DOCUMENT!**



Medical Cannabis & Worker's Comp

- The following states hold that employers must reimburse workers who are legal medical cannabis patients :
 - Arizona
 - Connecticut
 - Hawaii
 - Maine
 - Minnesota
 - New Hampshire
 - New Jersey
 - New Mexico
 - New York
 - Pennsylvania
 - Rhode Island
 - Vermont
- State laws in flux:
 - Delaware
 - Maryland
- The following states hold that employers do NOT have to reimburse workers:
 - Florida
 - Massachusetts
 - Michigan
 - North Dakota



CBD & Drug Testing

- CBD issues emerging – legal in all states but can contain 0.3% THC**
- DOD issued warning to servicemembers that CBD use is prohibited
 - Federal Ct in Indiana dismissed employee lawsuit after he tested positive for THC due to alleged CBD use and claimed that his termination was discriminatory on the basis of a disability. *Rocchio v. E&B Paving, LLC, and Int'l Union of Operating Engineers Local 103*, Case No. 1:20-cv-00417 (3/31/22)
 - DOT and CBD: *"It remains unacceptable for any safety-sensitive employee subject to the Department of Transportation's drug testing regulations to use marijuana. Since the use of CBD products could lead to a positive drug test result, Department of Transportation-regulated safety-sensitive employees should exercise caution when considering whether to use CBD products."*
 - MINER recently lost his work papers due to testing positive for CBD (WV State Supreme Ct ruling)
 - ✓ Researchers at University of Miami recently tested 516 CBD products, 121 of which were intended for oral consumption, and found: 42% had lead, 37% had mercury, 28% contained arsenic and 8% were positive for cadmium (Delta-8 vapes had similar contamination)



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